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14 HSBC MORTGAGE CORPORATION (USA) and
15 HSBC BANK USA, N.A.

16 UNITED STATES DISTRICT COURT
17
18 NORTHERN DISTRICT OF CALIFORNIA
19
20 SAN FRANCISCO DIVISION

21 Philip Wong, Frederic Chaussy, and Leslie
22 Marie Shearn, individually, on behalf of all
23 others similarly situated, and on behalf of
24 the general public,

25 Plaintiffs,

26 v.

27 HSBC Mortgage Corporation (USA);
28 HSBC Bank USA, N.A.; and DOES 1
through 50, inclusive,

Defendants.

Case No. C 07 2446 MMC [ECF]

**[PROPOSED] ORDER DENYING
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION UNDER
FED. R. CIV. P. 23**

Date: October 10, 2008
Time: 9:00 a.m.
Courtroom: 7 (19th Floor)
Judge: Hon. Maxine M. Chesney

1 On October 10, 2008, Plaintiffs' Motion for Class Certification Under Federal Rule of Civil
 2 Procedure 23 came on for hearing at 9:00 a.m. before the Honorable Maxine M. Chesney. Plaintiffs
 3 and Defendants were both represented by counsel.

4 For all the reasons set forth in Defendants' Opposition to Plaintiffs' Motion for Class
 5 Certification Under Federal Rule of Civil Procedure 23, the supporting documents filed with the
 6 Opposition, and the record herein, and based on the arguments of counsel, the Court orders as
 7 follows:

8 1. Plaintiffs' Motion for Class Certification Under Federal Rule of Civil Procedure 23 is
 9 DENIED. To meet their burden, Plaintiffs must show that the proposed classes meet all of the Rule
 10 23(a) requirements. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *see also*
 11 *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *In re Dalkon Shield Prod. Liab. Litig.*,
 12 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). The evidence submitted by the
 13 parties demonstrates that Plaintiffs have failed to meet their burden of showing that the proposed
 14 classes meet all of the Rule 23(a) requirements.

15 a. Plaintiffs have failed to show that the three proposed classes are so numerous
 16 such that joinder of all class members is impracticable as only a small percentage of putative class
 17 members have opted in to the FLSA action, thus evidencing that the Court can handle their claims on
 18 an individual basis. *Thiebes v. Wal-Mart Stores, Inc.*, 2002 U.S. Dist. LEXIS 664, at *8 (D.Or. Jan.
 19 9, 2002).

20 b. Plaintiffs have failed to show "commonality." Specifically, Plaintiffs have
 21 failed to show that class members are subject to an institution-wide policy or practice that constitutes
 22 an unlawful practice. *Williams v. Agilent Tech.*, 2004 U.S. Dist. LEXIS 24972 at *18 (N.D. Cal.
 23 Dec. 3, 2004); *see also Morisky v. Public Serv. Elec. and Gas Co.*, 111 F. Supp. 2d 493 (D.N.J.
 24 2000).

25 c. Plaintiffs have further failed to show "typicality" between the class
 26 representative's interest and putative class members' interests. Named Plaintiffs' work experiences
 27 are not necessarily the experiences shared by other loan officers; any determination requires an
 28

1 individualized inquiry as to whether named Plaintiffs' experiences are typical to other putative class
2 members. *See McNichols v. Loeb Rhoades & Co., Inc.*, 97 F.R.D. 331, 334 (N.D. Ill. 1982).

3 d. Plaintiffs have failed to show that the representatives can adequately represent
4 the proposed classes. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.
5 1978). Antagonism and conflict abound among putative class members; further, Plaintiffs have
6 improperly revealed confidential production and financial information about putative class members
7 that they had no right to reveal.

8 2. Plaintiffs' Motion for Class Certification Under Federal Rule of Civil Procedure 23 is
9 also DENIED because Plaintiffs have failed to meet their burden of showing that the proposed class
10 certifications are appropriate under any one of the Rule 23(b) requirements. *See General Tel. Co. of*
11 *Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *see also Amchem Prod., Inc. v. Windsor*, 521 U.S.
12 591, 614 (1997); *In re Dalkon Shield Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*,
13 459 U.S. 1171 (1983).

14 a. Plaintiffs have failed to show "predominance." The question whether each
15 loan officer was improperly classified as exempt or was subject to unlawful deductions depends on
16 each individual loan officer's circumstances, and is different depending on various state laws and
17 regulations. *See Perry v. U.S. Bank*, 2001 U.S. Dist. LEXIS 25050 (N.D. Cal. Oct. 17, 2001).
18 Plaintiffs thus fail to show that common questions of law and fact predominate over individual
19 questions.

20 b. Plaintiffs have failed to show "superiority." Only 16.7% of putative class
21 members have opted into the FLSA action. This indicates that a class action is not the superior
22 method of resolving this controversy as plaintiffs who have opted in will be free to bring their
23 pendant state law claims as a part of their FLSA collective action. *Leuthold v. Destination Am., Inc.*,
24 224 F.R.D. 462, 469-70 (N.D. Cal. 2004).

25 **IT IS SO ORDERED.**

26 Dated: _____, 2008

27 _____
28 THE HONORABLE MAXINE M. CHESNEY

**[PROPOSED] ORDER DENYING
PLAINTIFFS' CONDITIONAL
CERT./PARTIAL MSJ**

2.

Case No. C 07 2446 MMC [ECF]